Office-Supreme Court, U.S.
FILED
MAY 30 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE GAS DISTRIBUTORS INFORMATION SERVICE

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Gas Distributors Information Service, having obtained and filed written consent of all parties to the case as required by paragraph 2 of Rule 36, submits this brief in support of the position of appellant Pacific Gas and Electric Company (PG&E).

INTEREST OF AMICUS CURIAE

Gas Distributors Information Service (GDIS) is a voluntary, unincorporated association of nineteen investor-owned companies and one municipal company engaged in distribution of natural gas throughout the central and eastern United States and the upper plains states. Member company distribution operations are regulated at the state or local

level. Based initially on a common interest in federal regulation of interstate natural gas transmission companies which serve as primary suppliers to members, GDIS provides information to members on federal regulation of the natural gas industry.

GDIS member companies are regulated utilities which distribute natural gas directly to residential, commercial and industrial users in their respective service areas, supplying a source of energy used for heating, cooling, hot water, cooking and clothes drying needs of consumers. As such, natural gas distribution companies are part of an energy industry which includes other fuel marketers competitively seeking to satisfy these same consumer needs and actively engaged in attempting to influence the consumer's decision as to choice of fuel. GDIS members, therefore, are regulated utilities which do business in a competitive environment. While they do not compete in their service areas with other gas utilities, GDIS members face formidable competition from other energy companies, both regulated and unregulated.

This very point was recognized by the Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980). The Court rejected the suggestion of the New York Court of Appeals that, because Central Hudson holds a monopoly over the sale of electricity in its service area, the Commission order restricting advertising did not restrict commercial speech of any worth. 447 U.S. at 566. Rejecting this suggestion as a basis for finding that Central Hudson's advertising was not protected commercial speech, the Court observed:

> Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. . . . Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.

447 U.S. at 567.

The decision of the California Public Utilities Commission (CPUC) in the instant case ordering that a private consumer group be given compulsory access for its messages to PG&E's monthly billing envelopes is based on a finding by CPUC that the ratepayer has a legal or equitable right to the extra space in PG&E's billing envelope.[1] CPUC observed that it would be beneficial for ratepayers that a private group approved by CPUC use the space to disseminate messages different from those of PG&E. Appendix, at A-17.

Neither legal precedent nor historical support exists for characterizing PG&E's billing envelope or extra space within it as anything other than the property of PG&E. Notwithstanding the long established principle of law that utility customers pay for service, not for the property used to render it, *Board of Public Utility Comm.* v. *New York Tel. Co.*, 271 U.S. 23 (1926); *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Comm'n*, 262 U.S. 276 (1923); *Smyth* v. *Ames*, 169 U.S. 466 (1898), the CPUC finds that

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[1]CPUC defined "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." Appendix to Appellant's Jurisdictional Statement, at A-3 [hereinafter cited as "Appendix"].

ratepayers possess rights to the extra space and, on the strength thereof, private consumer organizations found to represent ratepayers may utilize the extra space to disseminate their views to ratepayers without the consent of PG&E.

The ramifications of this ruling for GDIS members are sobering as are the implications of CPUC's alternate holding that, regardless of whether ratepayers have any property interest therein, access to a utility's billing envelope for the messages of private consumer organizations may be compelled on the ground that messages from a non-utility source are "beneficial to the ratepayers." Appendix, at A-48. If protected First Amendment rights of a regulated company may be extinguished by the simple device of characterizing utility property as property of the ratepayer, then it is certainly not difficult to imagine other, less exalted rights succumbing to other, equally gossamer characterizations.

Privately owned utilities enjoy the full panoply of First Amendment protections for their comments on public issues, *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530 (1980), and any significant imposition by the State on such protected speech, be it direct or indirect, intentional or incidental, is considered an abridgement of free speech. *Speiser* v. *Randall*, 357 U.S. 513 (1958). The commercial speech of a utility is entitled to constitutional protection as well. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, *supra*. If the utility's communication is neither misleading nor related to unlawful activity, the State cannot regulate commercial speech unless a substantial interest of the State is directly advanced and the narrowest types of restriction on expression are employed. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. at 564-565.

If the compulsory access ruling in the instant case can withstand First Amendment scrutiny applicable both to protected commercial and non-commercial speech of a utility, thereby providing a sanction for the requisitioning of space in a utility's billing envelope to carry the message of private consumer groups, the field is open to the discovery of other novel incidents of ownership which may also be disconnected from the underlying property and employed by regulatory bodies for like purposes. And if, as here, legal fictions need not be grounded in necessity and equity,[2] then the imagination is free to roam the entire business of the utility in search of items of property which may be subjected to comparable disconnection.

If unused space in a billing envelope may be taken over and allotted to the use of a private consumer organization, no significant extension of the doctrine is necessary to permit a finding of ratepayer property interest in unused space on utility trucks or truck bumpers for the placement of anti-utility messages. Salaries of meter readers and appliance service personnel are paid from funds generated by ratepayers and, because such individuals must regularly visit ratepayer residences in any event, it is only a small

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[2]As stated by Blackstone in the Commentaries, "Fictions of law, although they may startle at first, will be found, on consideration, to be highly beneficial and useful." Quoted in W. M. Best, A Treatise on Presumptions of Law and Fact, 24-25 (1845). According to Best, it is a well known maxim of the common law that "in fictione juris, semper subsistit aequitas." Id., at 25. In consequence of this maxim, the author notes, two rules have been laid down. "First, fictions are only to be made for necessity, and to avoid michief [sic], and, consequently, must never be allowed to work prejudice or injury to an innocent party." Id., at 25. The second rule is "that the matter assumed as true must be something physically possible." Id., at 25-26. The fiction that ratepayers own the extra space in PG&E's billing envelopes fails both rules and the maxim as well.

extension of the CPUC doctrine to require such personnel to drop off fund solicitations and other messages of consumer groups. No extension whatever is needed to cover space in window displays in a utility's downtown office or in appliance showrooms. All of these interface areas wherein a utility operation comes into contact with the ratepayer are potential means of conveying fund solicitation and other consumer messages.

It is a premise of the CPUC ruling that the extra space has value. Appendix, at A-3. If that assessment is correct, it may well occur that other consumer organizations will claim to represent ratepayers and that access to billing envelopes or to other "artifacts generated with ratepayer funds," Appendix at A-3, by multiple consumer groups will ensue. If multiple access were permitted either serially or simultaneously, it would be natural to expect, absent regulation of content by CPUC as is its style in this matter, that each representative would strive to be regarded as the most effective advocate of the ratepayer interest in connection with the issue of the day. While a multiplicity of opinions is unremarkable in an open society, it would indeed be remarkable doctrine if a utility company which competes for customers with other fuel sources and which, in consequence, attempts to disseminate information on the peculiar advantages of its service may be compelled to convey to customers the messages of one or more private groups which may well emphasize alleged inadequacies and high cost of such service.

SUMMARY OF ARGUMENT

Like other commercial enterprises, utility companies have traditionally used inserts in their monthly billing envelopes to communicate with their customers on commercial matters as well as on public issues of the day. In respect

of such speech, privately owned utility companies enjoy the full panoply of First Amendment protection, *Consolidated Edison Co.* v. *Public Service Comm'n*, supra; *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, supra, and a utility is protected in its desire to "use its own billing envelopes to promulgate its views on controversial issues of public policy." 447 U.S. at 540. The dedication of such assets to a regulated activity does not, under precedents established in this Court, result in a loss or diminution by the utility of its property therein. *Board of Public Utility Comm.* v. *New York Telephone Co.*, 271 U.S. 23 (1926).

By declaring that property in the extra space of PG&E's billing envelope resides in the ratepayer and that private consumer representatives selected by CPUC are entitled to access to the envelope, PG&E's right to promulgate its views is made to hinge on a matter of property rather than of First Amendment right. Where fundamental rights of speech depend for their exercise on property in a particular means of communication, the allocation by the State of property therein to another by means of a fiction such as here constitutes an abridgment of protected speech.

When a utility uses its billing envelope to promulgate its views to customers it is exercising protected First Amendment rights and does not thereby dedicate the envelope as a medium for public debate. Because the right to speak and the right to remain silent are equal components of free speech, *Wooley* v. *Maynard*, 430 U.S. 705 (1977), whether PG&E is denied access to the extra space or compelled to publish the views of private groups an abridgment of First Amendment rights occurs.

Before the State may regulate protected speech it must demonstrate that regulation serves a compelling state interest and that its regulation is narrowly drawn. *Consolidated*

Edison Co. v. *Public Service Comm'n*, supra. Neither of the interests identified here, that appellant is a monopoly utility and that ratepayers should be informed of a broad range of views, is in itself adequate to support regulation of protected speech. *Consolidated Edison Co.* v. *Public Service Comm'n*, supra; *Miami Herald Publ. Co.* v. *Tornillo*, 418 U.S. 241 (1974). Other less intrusive methods are available to promote increased ratepayer participation and awareness such as awarding of fees to intervenors in CPUC proceedings.

ARGUMENT

PG&E's Rights Are Abridged In Violation of the First Amendment By the CPUC Order Assigning to a Private Party Access to the Company's Billing Envelopes For the Purpose of Soliciting Funds From Ratepayers and Communicating Views to Them

It has long been settled by decisions of this Court that the dedication of assets to a regulated activity does not result in a loss or diminution by the utility of its property in such assets. *Board of Public Utility Comm.* v. *New York Telephone Co.*, 271 U.S. 23 (1926); *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Comm'n*, 262 U.S. 276 (1923); *Smyth* v. *Ames*, 169 U.S. 466 (1898). As stated in *Southwestern Bell:* "It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership." 262 U.S. at 289. The state is not the owner of the property of a utility company and neither is the ratepayer. Customers pay for service, not for the property used to render it. "By paying bills for service [customers] do not acquire any interest, legal or equitable, in the property used for their con-

venience or in the funds of the company." *Board of Public Utility Comm.* v. *New York Telephone Co.*, 271 U.S. at 32.

In light of the foregoing, there is no legal support for characterizing either PG&E's billing envelope or extra space within it as being other than the property of PG&E. It is apparent, however, that CPUC was at considerable pains to divest PG&E of property in the extra space so as to establish a legal basis for requiring the message of consumer representatives. While not adopting the notion that the envelope itself is ratepayer property, CPUC found that the extra space in the billing envelope has value and, as an "artifact generated with ratepayer funds," it would unjustly enrich PG&E if the excess space were not considered ratepayer property. Appendix, at A-2, A-3.

CPUC's analysis of the ratepayer's interest in the extra space was subsequently refined as follows:

> We have stated that the extra space belongs to the ratepayers. In so doing, we are not so much describing a traditional property right as an equity right . . . . [W]e are saying that the *reason* the ratepayers pay for the billing envelopes and postage is that those costs are an expense necessary to the operation of the utility. So what the ratepayers are legitimately paying for is the conveyance of their bills and occasionally legally mandated notices. Since these documents together do not generally add up to one ounce . . . the ratepayer has paid for some empty space . . . . "

Appendix, at A-4. Thus, while decisions of this Court have made clear that by paying for service customers secure no interest, legal or equitable, in the utility property used for their convenience, *Board of Public Utility Comm'n* v. *New York Telephone Co.*, 271 U.S. at 32, CPUC finds that the

extra space belongs to the ratepayer either as a legal right or as an equity right.

In recognition perhaps that its legal analysis stood in need of shoring up, CPUC supplemented its ruling following PG&E's application for rehearing to point out that its jurisdiction over the extra space did not depend "solely or entirely" on a determination of the ownership of the extra space or the exact nature of a property right in such space:

> The extra space in the billing envelope is a byproduct of an activity essential to the operation of the regulated utility - billing. Since billing is an essential and proper function of a regulated utility this Commission has allowed the utility to recover its reasonable expenses - postage, materials, labor, overhead - from ratepayers. The existence of the extra space is a direct consequence of the act of billing for utility services and the way in which postal costs are assessed.

Appendix, at A-46. In further support of its finding of jurisdiction over "billing space," CPUC observed:

> Use of the billing space to accomplish various informative functions for the ratepayers now occurs so frequently that it had [sic] become a routine matter. Notices of applications for rate increases and notices of public hearings are regularly inserted without objection in billing envelopes. . . . We have also required utilities to include notices of the availability of various energy conservation programs (D. 92653) and conservation information (D. 89316). We have required our utilities to include an insert informing ratepayers of the effects of a complicated federal tax law (D. 93887). . . . All of these are examples of the proper use of a valuable means of communication that the extra space provides.

Appendix, at A-47. Having cited the foregoing examples of use of billing space for the benefit of ratepayers, CPUC noted that the proposal of the private consumer group TURN (Toward Utility Rate Normalization) for access to the extra space would also be beneficial to ratepayers on the assumption that "ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E." Appendix, at A-17. In consequence, CPUC granted TURN access four times a year for a two-year period with no control imposed by CPUC on the content of the TURN material. Appendix, at A-17.

The legal basis, therefore, for CPUC's order mandating that a private organization be given access to extra space in the billing envelope of PG&E for the purpose of using that vehicle to disseminate its views is that ratepayers possess a legal or equitable right to such space and, in any event, access to such space would be beneficial to the ratepayer. There are a number of reasons why the CPUC order does not withstand First Amendment scrutiny.

(1) The CPUC Order Implicates Protected Rights of Speech And Thus First Amendment Scrutiny May Not Be Circumvented By the Expedient of Declaring Extra Space to Be the Property of Ratepayers.

If a utility company such as PG&E did not possess rights protected by the Constitution, there might be no objection to establishing the concept that ratepayers possess a property interest in the extra space of a billing envelope. Indeed, CPUC conceives of the issues in the instant case essentially as property issues rather than issues of constitutional right. To each of PG&E's objections founded in the Constitution, CPUC answers that PG&E does not possess property in the extra space.

Thus, CPUC meets the Fifth Amendment "taking" contention by stating that the company ignores the "central

point" that the extra space is not property held by PG&E. Appendix, at A-26. In like manner, property is set up in answer to each of the First Amendment objections. To the extent PG&E's message is forbidden in favor of TURN's, this result occurs, says CPUC, "on the ground that the space belongs to the ratepayers, not on the basis of the content." Appendix, at A-21. To the extent PG&E is being required to publish messages it does not wish to publish, that too is readily answered by CPUC: "[W]e are simply ordering PG&E which has physical control over the extra space belonging to the ratepayers to make it available." Appendix, at A-23. As to the issue of narrowly tailored means to serve a compelling State interest, that question, according to CPUC, does not even arise: "As we have reiterated many times now, since that space is not the property of PG&E in the first place, it has no right to use the space for First Amendment purposes." Appendix, at A-22.

CPUC's property approach is an impermissible abridgment of speech precisely because PG&E possesses First Amendment rights to communicate to its customers through its billing envelopes and, if it chooses, to refrain from so communicating. At least since this Court's decision in *Consolidated Edison Co.* v. *Public Service Comm'n*, *supra*, the First Amendment protection recognized as surrounding a utility company's use of its billing envelope as a means of communication, even though the envelope may also be a necessary adjunct to the utility's operations, has demanded far greater sensitivity to the fundamental rights involved than the short shrift manifested in the CPUC decision. Where fundamental rights of speech depend for their exercise on property in a particular means of communication, the compulsory allocation of access thereto by the State plainly implicates the First Amendment.

By declaring the extra space in the envelope to be ratepayer property, CPUC forecloses analysis of the abridgment by setting up the abridgment itself as its own justification. As such, the CPUC analysis is defective. The constitutional issue that must be addressed is whether a finding of ratepayer property in the extra space, property which had heretofore been generally agreed to be in PG&E, so restricts a utility's fundamental right of communication to its customers that it is impermissible unless a compelling State interest is thereby promoted and narrower alternative means are unavailable to the State. Certainly a private owner has the right to preserve the property under its control for the use to which it is lawfully dedicated. *Cf. U.S. Postal Service* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 (1981). If such property is a vehicle of First Amendment rights, as here, CPUC may not summarily extinguish such property without rigorously observing the constitutional forms.

(2) PG&E's Use of Its Billing Envelope For Communication With Customers Is A Traditional Use And Does Not Constitute a Dedication of the Envelope as a Vehicle For Public Debate.

It is well established that one essential aspect in the bundle of rights that constitute property is the right to exclude others. *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 82 (1980). In the area of speech, a private property owner possesses a First Amendment right not to be forced by the State to use his property as a forum for the speech of others. *Wooley* v. *Maynard*, 430 U.S. 705 (1977). Nevertheless, at an owner's behest private property may be so used by the public as to constitute a dedication to public use, *Pruneyard Shopping Center* v. *Robins*, 447 U.S. at 87, and in such situations the owner may be required to permit dissemination on his property of ideological messages.

Unlike shopping centers which deliberately choose to open private property to a broad range of expression, the

billing envelopes of PG&E have not been opened to the public for discussion of views. Aside from monthly bills and legally mandated notices, the only material included in the envelopes is PG&E's own in-house publication, *Progress*. Appendix, at A-2. Utility companies have traditionally used their billing envelopes to communicate with customers and this practice, engaged in by many commercial enterprises, cannot reasonably be deemed to dedicate the billing envelope as a medium of public debate. Indeed, this very distinction was drawn in *Consolidated Edison* where the Court contrasted Con Ed's desire "merely to use its own billing envelopes to promulgate its views on controversial issues of public policy," 447 U.S. at 540, with factual settings in *Greer* v. *Spock*, 424 U.S. 828 (1976), and *Lehman* v. *Shaker Heights*, 418 U.S. 298 (1974), where private parties asserted a right of access to public facilities.

(3) Compulsory Access By a Private Party to PG&E's Billing Envelope Denies PG&E the Right to Remain Silent and Is a Regulation of the Content of Its Speech

The right to speak and the right to remain silent are equal components of the right of free speech guaranteed by the First Amendment, and a person may not be compelled to publish a message or advocate a proposition with which he may disagree. *Wooley* v. *Maynard*, 430 U.S. 705 (1977); *Miami Herald Publ. Co.* v. *Tornillo*, 418 U.S. 241 (1974). Compulsory access to the billing envelope for four months of the twelve-month cycle denies the utility its right to refrain from advocacy on those occasions. Additionally, in denying PG&E access to its billing envelope for messages of its own during the period assigned to TURN, CPUC regulates the content of speech by favoring TURN's message, whatever it may be, to the message of PG&E.

(4) Less Instrusive Measures Are Available to Promote the State Interest Than Compulsory Insertion In Billing Envelopes of the Messages of Private Parties

If protected speech of a utility company is to be regulated the State must demonstrate that regulation serves a compelling State interest and that its regulation is narrowly drawn. *Consolidated Edison Co.* v. *Public Service Comm'n, supra; Central Hudson Gas & Electric Co.* v. *Public Service Comm'n, supra.* The State interest identified by CPUC for its regulation here is that the State has an interest in regulating monoply utilities, Appendix, at 26-27, and further that ratepayers will benefit more from exposure to a variety of views than they will from only those of PG&E. Appendix, at A-17.

An interest in regulating monoply utilities is not in itself a compelling state interest permitting regulation of speech in light of the *Consolidated Edison* and *Central Hudson* decisions of this Court which hold that privately owned utility companies enjoy the guarantees of the First Amendment. As to the state interest in the ratepayer being informed, that desirable goal was held inadequate to support state regulation of speech in *Miami Herald Publ. Co.* v. *Tornillo, supra.* While approving a broad airing of views by the press as a laudable goal, the Court observed that "press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." 418 U.S. at 256.

Alternative methods exist for promoting greater ratepayer participation in CPUC proceedings and greater awareness on energy issues. The most obvious alternative to forcing PG&E to publish TURN's fund solicitations is direct subsidization by CPUC and, indeed, as the dissenting CPUC Commissioner notes, CPUC rules provide for the award of intervenor's fees. TURN itself has in the past been

awarded fees for its participation in ratemaking proceedings before CPUC. Appendix, at A-56. The greater use of such authority might eliminate the need perceived by CPUC to encourage ratepayer participation through a restriction on PG&E's speech.

Seeking to play down its extraordinary intrusion into First Amendment rights of PG&E, CPUC provided a supplemental basis for its order in responding to PG&E's application for rehearing, noting that it has repeatedly exercised jurisdiction over the billing space to mandate insertion of legal notices such as notices of public hearings, notices of energy conservation programs, and the like. Appendix, at A-48. Having routinely required the billing space to be used for the benefit of ratepayers, CPUC asserts, the order compelling PG&E to permit the insertion of TURN messages is simply the acceptance by CPUC of another use of the space for the benefit of ratepayers.

But the CPUC order compelling insertion in PG&E's billing envelopes of fund solicitations and other messages of a private consumer group differs profoundly from PG&E orders compelling the insertion of legal notices. According to CPUC, it will undertake no control of the material inserted by TURN in PG&E's billing envelope. TURN material thus may cover any subject that organization wishes to address. One of the essential vices of the means chosen by CPUC is that responsibility for inserted messages passes out of the hands of an organ of government and into private hands, with interesting results for PG&E. If a notice mandated by CPUC itself for insertion is defamatory of PG&E or a third party or is plainly erroneous, PG&E would be entitled to test the legality of the insert order in a legal proceeding. State bodies such as CPUC have no rights under the First Amendment but instead possess such powers as are conferred on them by the legislature or the

people. Their orders may not exceed their authority, and such bodies may not embark on unauthorized activity. Legal notices, in other words, must be legal.

Private groups such as TURN, by contrast, possess rights. If defamatory or erroneous materials were submitted to PG&E by TURN, any attempt to restrict its publication would almost certainly be deemed a prior restraint forbidden by the First Amendment. It is evident from the foregoing that an order requiring PG&E to publish TURN speech is profoundly different from an order requiring PG&E to publish legal notices. As a general matter the delegation of regulatory power to private groups is out of keeping with the spirit of democratic institutions but this particular specimen is especially obnoxious insofar as it forces PG&E to publish private views over which it has no control and, as a matter of First Amendment law, can exercise no restraint. Under the CPUC order, therefore, the reversal of roles and accompanying rights is complete.

CONCLUSION

The order of the California Public Utilities Commission constitutes an abridgment of the freedom of speech guaranteed Pacific Gas and Electric Corporation by the First Amendment and should be struck down.

Respectfully submitted,

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May 30, 1985